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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JOHN TAYLOR
KELLY TWOMEY, and
WAYNE LAFRANCE

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Is it reasonable to expect that film delivered to a photo finishing shop will be free from warrantless government seizure which lacks probable cause and exigent circumstances?

2. Does a conspiracy to distribute require an agreement among the conspirators to distribute to others outside of the conspiracy?

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NO.

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JOHN TAYLOR
KELLY TWOMEY and
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Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners John Taylor, Kelly Twomey, and Wayne LaFrance request that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the First Circuit affirming their convictions in the United States District Court for the District of Maine of conspiracy to possess with intent to distribute marijuana.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, is printed in Appendix A ( ). The District Court opinion

denying the suppression motions is officially reported at 515 F. Supp. 1321, (D.Me. 1981), and is printed in Appendix B ( ).

JURISDICTION

The judgement of the court of appeals was issued on July 19, 1982. This Petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The pertinent statutory and constitutional provisions are: United States Constitution, Amendment IV, 21 U.S.C. §§841 (a)(1), 844 and 846. They are set out in full in Appendix C-F.

I. STATEMENT OF THE CASE

A. PHOTOGRAPHS

In the district court, Defendants-Appellants sought to suppress evidence seized from a vessel without a warrant and photographs seized by law enforcement officers without a warrant, probable cause or exigent circumstances. 1/ These motions were denied by the district court, see Appendix B, and affirmed by the First Circuit Court of Appeals, see, Appendix A.

There is little dispute as to the facts regarding the warrantless seizure of the photographs. Rolls of film jointly owned by the petitioners were delivered to a processing company in Massachusetts where three sets of prints were ordered, one for each petitioner. An employee was examining a test sheet depicting part of the photographs when a deputy of the local sheriff's office who was visiting the shop had his attention

1/ The search and seizure of evidence from the vessel do not merit review by the Supreme Court.

directed to them by the employee. The deputy observed a photograph of a man holding a shotgun. Examination of the prints caused him to think that they might depict "what could have been transportation of marijuana." He did not have any on-going investigation or case regarding marijuana at that time nor did he know or have reason to recognize anyone in the photographs. He told the employee to put the test sheet aside while he called his supervisor, Edward Woodfin. He requested that Woodfin examine the test sheet as he "thought it might have been something in connection with smuggling."

Woodfin arrived about ten to twenty minutes later, and examined the sheet. He ordered the employee to make an extra copy of the finished photographs for him although, at that time, he also had no knowledge of or involvement in any case or investigation involving anything like the events in the photographs and did not know anyone depicted in them. Woodfin waited around

the shop for twenty to thirty minutes and departed, returning later in the day for the copy he had ordered. The petitioners came for their copies the next day.

No warrant was sought for the seizure of the photographs although a magistrate empowered to issue search warrants was available only eight to ten minutes from the photo shop and the earliest petitioners were expected to return to the shop for their photographs was the next day.

There is no evidence that at the time of the seizure the sheriff's department was working on or had knowledge of an investigation or had any information of any kind regarding the vessel, the individuals or the events depicted in the photographs. There is nothing to indicate that the individuals depicted in the pictures were known to the police in any way at all or were suspected of any kind of crime. There is no evidence that the sheriff's office had any information of any kind pertaining to any smuggling activity in that area

at that time. According to their testimony, the deputies only suspected that they might have something. They had no facts creating probable cause. No charges were brought until a year or so later.

B. THE JURY INSTRUCTION

The petitioners were accused of being in league with others in a conspiracy whose purpose was alleged to be possession of marijuana with the intent to distribute it. At trial, the theory of the defense was that if there was a conspiracy, at most, its purpose was to possess marijuana within the conspiratorial group. The government introduced into evidence only four pounds of marijuana discovered on the shore in the vicinity of the petitioners' beached vessel. Three ounces were found on the boat itself. Although the conspiracy allegedly consisted of the three petitioners and diverse others, unknown, only three of the conspirators were on trial - the petitioners.

The government's position, that the jury could infer that a larger amount was involved, was based in part on the photographs of two or three packages. The defense position was that consideration of an amount of marijuana larger than actually seized was speculative because the photographs did not reveal the contents of the two or three bags and the photos did show an open cabin and passageway. The trial judge found that the trial evidence warranted a jury instruction on the lesser included offense of conspiracy to merely possess marijuana. He would not, however, instruct the jury that conspiracy to possess with intent to distribute meant an agreement by the conspirators to distribute outside of the conspiratorial group. His instruction did not distinguish between the conspiratorial group, comprising the petitioners and others, and individuals who were not in the conspiracy. The failure to make the distinction

for the jury between others in the conspiracy but not on trial and others not in the conspiracy prevented the jury from fairly considering the defense theory of the case, i.e., that evidence of transfers of marijuana among co-conspirators, including named and unnamed conspirators, as part of an agreement to possess for personal use did nto support a conviction of conspiracy to possess with intent to distribute. The intent to distribute had to be an intent to distribute outside of the conspiracy. There was no substantive charge of distribution in this indictment.

The trial judge did not give the defense theory to the jury; instead, he instructed them that if they found that defendants possessed a large amount of marijuana then they could infer that defendants intended to distribute it "to others." The defense objected to this instruction because it failed to adequately define "others." It did not

inform the jury that they had to find an agreement among all of the conspirators to distribute outside of the conspiratorial group. If the defendants and other conspirators were going to keep the marijuana among themselves, then their agreement or conspiracy was only to possess.

The instructions given probably confused the jury who could have easily believed that a transfer or distribution by the defendants to other conspirators was sufficient to establish a conspiracy to possess with intent to distribute.

The petitioners were found guilty of a conspiracy to possess with intent to distribute. On appeal, the failure to instruct the jury on the defense theory of the case was found not to constitute reversible error and their convictions were upheld.

REASONS FOR GRANTING THE WRIT

I.

This Court should determine whether or not prints from film submitted for processing are subject to governmental seizure without a warrant, probable cause or exigent circumstances.

The seizure of the photographs in this case presents an interesting twist to the old adage common in other histories that only the guilty need worry. The First Circuit has held at page 6 of its slip opinion that the police may seize prints made from any film brought by anyone to a photo finishing shop and that they do not need a warrant, probable cause or exigent circumstances to make such seizure. The only requirement is a suspicion that the prints could, at some time, be evidence used in a case and there need be no case or investigation underway at the time of the seizure.

The First Circuit's premises that plain view of the film by shop employees removes the owners privacy interest can logically be extended to include photo copy centers and print ships as well as photo developing establishments used by citizens and small businesses which cannot afford their own in-house facilities.

This decision conflicts with the prior decisions of this Court in such cases as Lo-Ji Sales, Inc. vs. New York, 442 U.S. 319 (1979) in which this Court held that a legitimate expectation of privacy against warrantless government seizure attached to property on display to the public for sale. The police in that case could not seize obscene material from a store which offered the items for sale even though they had probable cause. Their warrant was too general and a specific warant was required.

In McDonald v. United States, 334 U.S. 451(1968), this Court held that police who

observed illegal betting slips and gambling money needed a warrant to enter the premises and seize the illegal items. See also, Coolidge v. New Hampshire, 403 U.S. 443, 461-469 (1971). The Sixth Circuit Court of Appeals, in Clark v. Neil, 427 F.2d 1322 (6th Cir.1970), held that police could not seize a defendant's suit left for cleaning from the cleaning establishment without a warrant since there were no exigent circumstances even though there was probable cause. Two state supreme courts have made similar rulings. The Supreme Court of Rhode Island in State v. Farrell, R.I., 443 A. 2d 438 (1982), held that property given to a third person for a specific purpose, other than to confer common authority on that person, does not divest the owner of Fourth Amendment protection against

the seizure of that property. In State v. Sweatt, Me., 427 A.2d 940 (1981), the Supreme Court of Maine held that goods consigned to a store for sale could not be seized by the police from a public display without a warrant. In the case sub judice neither a warrant, probable cause nor exigent circumstances were found necessary by the First Circuit.

The First Circuit decision conflicts with the previous decision of this Court in Warden vs. Hayden, 387 U.S. 294 (1967), in which this Court held that the police need probable cause to believe that evidence they intend to seize would "aid in a particular apprehension or conviction." Id. at 307. Probable cause has been defined by this Court as meaning something more than mere suspicion. Brinegar v. United States, 338 U.S.

106,175(1949).

The Eighth Circuit Court of Appeals takes a different position than the First Circuit on this issue as can be found in United States v. House, 504 F.2d 1135 (8th Cir. 1979). In that case, photographs of an automobile were seized during a search pursuant to a warrant for narcotics. That seizure was not justified under the plain view exception because the incriminating nature of the photographs was not immediately apparent. The decision in this case also appears to conflict with a decision of the First Circuit which required probable cause for the seizure of mere evidence. United States v. Sheehan, 583 F.2d 30 (1st Cir. 1978). In Sheehan, the First Circuit held, at page 39, that "a legal premises search could not justify the photocopying of, say, diaries or correspondence observed during the completely unrelated to the objectives to the search."

More than mere suspicion that the evidence might be depicting what could have been a crime is necessary to seize the private property of another.

The Fourth Amendment was designed to protect people in their persons and affects and this Court ought not let modern technology be utilized as a device to skirt the intention of our Founding Fathers. It is not reasonable to let the police seize extra prints made from film sent in for processing or extra copies of documents sent to a photocopying center when they have no probable cause, there are no exigent circumstances, they have no case or investigation underway, and do not bother to obtain a warrant which is readily available.

II.

This Court should consider whether distribution by one co-conspirator to another establishes a distribution conspiracy.

The opinion below presents an opportunity for this Court to clarify the essential agreement which must be established to support a conviction for conspiracy to possess with intent to distribute (marijuana) and to differentiate between that and the lesser offense of conspiracy to merely possess. Cf. 21 U.S.C.§§841 (a)(1), 844 and 846.

Although the crime of conspiracy is "so vague that it almost defies definition," Krulewitch v. United States, 336 U.S. 440, 446 (1949), (Jackson J., concurring), this Court has often recognized the need to clarify the scope of conspiracy law. Cf. e.g., Braverman v. United States, 317 U.S. 49 (1942).

Petitioners who were indicted and convicted solely for conspiracy to possess with intent to distribute marijuana were denied a fair trial because the jury was not adequately informed of the elements

of the conspiracy charged. They were never told that transfers of marijuana among co-conspirators for their own personal use can not support a conviction of an agreement or conspiracy to possess with intent to distribute. Cf. United States v. Swiderski, 548 F. 2d 445 (2d Cir. 1977) [distribution between joint possessors for personal use insufficient to support conviction under 21 U.S.C. §841 (a) (1)] and Pinkerton v. United States, 328 U.S. 640 (1946) [the acts of one conspirator are imputed to the others e.g., possession by one is possession by all.]

After hearing the evidence at trial, the judge determined that the jury was entitled to consider the lesser-included offense of conspiracy to merely possess marijuana. Fed. R. Crim. P. 31 (c); Waker v. United States, 344 F. 2d 795, 797 (1st Cir. 1965). The instruction talked only in terms of the conspirators on trial and did not

address the agreement of the conspiratorial group as a whole. The government did present evidence of the existence of conspirators other than the defendants and aryued that the distribution by the defendants to others within the conspiracy established the groups purpose to be an intent to distribute. Mere distribution within the group does not establish the agreement to be intent to distribute since an agreement to merely possess would also require actual distribution within the group. A distinction should have been drawn between the intent of the conspirators as a whole rather than the defendants alone. It should have focused on whether the group's purpose was to have the marijuana for itself rather than focusing on the issue of a distribution within the group as being indicative of the group's purpose.

An instruction on the defense theory of the case would have informed the jury that a distribution conspiracy required

proof of an agreement among the conspirators to distribute marijuana to persons who were not members of the conspiracy. Failure to give such an instruction and the instruction, over defense objection, that evidence of any distribution by the defendants "to others" would support a conspiracy to distribute, allowed the jury to convict without finding the essential element that the conspirators' agreement was to distribute to persons outside of the conspiracy. There is a substantial likelihood that the jury was confused and believed that any transfer of marijuana - even from one conspirator to another - was sufficient to support a conviction for conspiracy to distribute.

As the Second Circuit recognized in United States v. Swiderski, supra, a transfer of contraband among joint possessors for personal use is not a distribution within

the meaning of 21 U.S.C. §841 (a)(1). Transfer of marijuana from some conspirators to other conspirators as part of an agreement to possess for their personal use does not support a conviction for conspiracy to possess with intent to distribute.

The court of Appeals did not say that the trial court was "clearly erroneous " in finding the evidence warranted jury consideration of a conspiracy to merely possess. See United States v. Prieskorn, 658 F.2d 631,638 (8th Cir. 1981). Since there was evidence to support the defense theory, a conspiracy to possess for personal use,2/ the jury should have been instructed that if it found that the petitioners and other

2/ The actual amount of marijuana seized was insubstantial. This was not a case where a conviction of a conspiracy to possess would have been inconsistent with the evidence See, United States v. Rodriguez, 585 F. 2d 1234, 1246 (5th Cir.), mod'd en banc, 612 F.2d 906, 908 n. 3 (5th Cir.1980).

conspirators did not intend to distribute to others outside the conspiracy, it could only convict of a conspiracy to possess.

Other circuit courts of appeal have held that the failure of a trial court to instruct the jury on a defendant's theory of the case, when supported by the evidence, is reversible error. See United States v. Prieskorn, supra, 658 F. 2d at 636.

It is apparent that the judgement of the First Circuit, like that of the trial court, confused the substantive distribution offense with the offense of conspiracy. More importantly, the court of appeals failed to follow applicable decisions of this Court which emphasize that the substantive offense and a conspiracy are different offenses, and requiring different proof.

It is well established that it is the agreement which constitutes the crime of conspiracy and distinguishes it from

substantive offenses. Braverman v. United States, supra, 317 U.S. at 53. It is not important that one conspirator gave marijuana to another for a conspiratorial purpose. What is important is what the group agreed to do. A conspiracy conviction in this case required proof that the conspirators agreed to distribute the controlled substance to "others" who were not members of the conspiratorial group. To hold otherwise, would be to eliminate the offense of conspiracy to possess because some transfer almost always occurs within a group whose only intent is to possess.

The agreement of the participants in a distribution, as opposed to a possession, conspiracy must be to distribute to persons outside of the group.

This concept has been implicity recognized in other federal circuits which have examined drug conspiracies. The Fifth Circuit

only recently held that a conspiracy may be found where "the evidence is adequate to demonstrate that all of the alleged co-conspirators directed their efforts towards the accomplishment of a single goal or common purpose." United States v. Elam, 678 F.2d 1234, 1245 (5th Cir. 1982). "Because the crime of conspiracy requires a concert of action among two or more persons for a common purpose, the mere agreement for one person to buy what another agrees to sell, standing alone, does not support a conspiracy conviction." United States v. Mancillas, 580 F. 2d 1301, 1307 (7th Cir. 1978); see United States v. Prieskorn, supra, 658 F.2d at 634. By implication, the agreement of the petitioners to deliver marijuana to confederates on shore does not support a conviction for conspiracy to possess with intent to distribute. When the confederates' only purpose is to gain

actual possession for the group there is "no joint objective of distribution." Id. citing United States v. Ford, 324 F. 2d 950, 952 (7th Cir. 1963).

If this Court examines the record, it will determine that petitioners were denied a fair trial by the denial of the requested instruction.3/

3/ It is also interesting for this Court to consider that the court of appeals apparently relied on Defendant Taylor's testimony at the suppression hearing when considering whether or not the evidence supported the defense instruction. This conflicts with the principle enunciated in Simmons v. United States, 390 U.S. 377 (1968), as utilized in Rakas v. Illinois, 339 U.S. 83 (1978), and Rawlings v. Kentucky, 448 U.S. 98 (1980), and might require this case be remanded to the court of appeals for reconsideration without the utilization of Taylor's testimony.

CONCLUSION

For the reasons cited, Petitioners request this Court to grant the writ requested herein.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September 1982, three true and accurate copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit was mailed, first class, postage prepaid, to the Office the Solicitor General, Department of Justice, Washington D.C.

MARVIN D. MILLER
Record Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 81-1570

UNITED STATES OF AMERICA

Appellee

v.

JOHN TAYLOR

Defendant-Appellant

NO. 81-1580

UNITED STATES OF AMERICA

Appellee

v.

KELLY TWOMEY

Defendant-Appellant

NO. 81-1585

UNITED STATES OF AMERICA

Appellee

v.

WAYNE LAFRANCE

Defendant-Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[HON. JUAN R. TORRUELLA, U.S. District Judge*]

Before
Coffin, Chief Judge

ALDRICH and BREYER, Circuit Judges,

Marvin D. Miller, with whom Jay Colangelo, Richard Emerson, Jr. and Ronald Chisholm were on brief for appellants, Margaret McGaughey, Assistant United States Attorney, with whom Richard S. Cohen, United States Attorney, was on brief for appellee.

JULY 19, 1982

*Of the District Of Peurto Rico, sitting by designation.

ALDRICH, Senior Circuit Judge. We add herewith to our collection of Tall Tales concocted by drug smugglers on the coast of Maine. Compare United States v. Weber, 1 Cir., 1981, 668 F.2d 552, cert. denied, 50 U.S.L. W. 3960, boat allegedly detained by "storm" on calm moonlight night with instant yacht choosing to stay in poorly protected spot with concededly inadequate anchor, although warned of coming high winds and sea. More will appear in due course.

On July 24, 1979, defendant Taylor, having executed a three-weeks bareboat charter, took possession of the 51 foot ketch I FORGOT at Curacao, Dutch Antill paying a charter fee of $6,600, plus a $5,000 deposit. On September 6, three weeks after the charter's expiration, the yacht was seen anchored in upper Frenchmens Bay, Maine, where she ignored the fisherman's warning. The next morning she was discovered on rocks near a deserted beach, slightly holed, and having taken water thereby. No one was on board, and all personal effects, including linen, had been removed. The boat was littered, from bow to stern on deck and below, with marijuana debris. In addition some 4 pounds of marijuana were subsequently found in the woods behind the beach. Warrantably marijuana

had recently been off-loaded.[1] An onshore wind of 30 knots, or more, had blown during the night. At high water lobstermen hauled her off. Her sails were badly torn, her batteries under water, and nothing functioned. They towed her to Sorrento Harbor, where the harbormaster put her on a mooring and placed a pump on board.

An hour or so afterwards the yacht was searched by one, later by a second, state police officer. Parelleling the custom of defendants making up stories in such cases, the search and seizure was conducted without a warrant, and far exceeded a permissible search for evidence of ownership. At the suppression hearing one of the officers testified that the harbormaster had said the boat was in danger of sinking, but the harbormaster denied this, and with him in charge, and a pump aboard, the denial seems logically correct. If there were a

1/ At the suppression hearing Taylor conceded that something not identified, had been off-loaded the night of September 6.

a danger of sinking, obviously he would beach her. A magistrate was not far away.

That officers are not told to obtain warrants, or, if they are told, should place themselves above instructions in such cases, is inexcusable. This omission cost a one day court hearing, with a witness and expense. In addition, the court had to prepare findings and three judges now have to review them. Beside such wasted time and effort, a warrantless search always risks the loss of evidence altogether. All this because of a little laziness on the part of the officers whose duty is to obey a very simple requirement.

At the suppression hearing, resolved in the government's favor, it appeared that defendant Taylor and co-defendants Twomey and LaFrance, had sat in the woods watching the rescue without attempting to make themselves known, and that Taylor hitchhiked towards theharbor, but had taken off on seeing the lights of a police car. The other de-

fendants had taken off without approaching the harbor. None were apprehended until some months later. Convicted of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. §846, they appeal. We affirm.

Defendant's first complaint is the warrantless search and seizure. We do not accept the government's claim that defendants had lost their privacy interest in the vessel due to the charter's expiring. (Nor, of course, could the officers know the status of the charter). Unlike the vacated hotel room cases cited by the government, e.g., United States v. Buchanan, 5 Cir., 1980, 633 F. 2d 423, 426, cert. denied, 451 U.S. 912; United States v. Cowan, 2 Cir., 1968, 396 F. 2d 83, termination of the charter did not restore the owner's physical possession. Rather, defendants manifestly remained in charge with, doubtless, contractual

rights and obligations. We do, however, accept the court's finding that when the defendants left the vessel ashore, they abandoned her. No line had been made fast, and no writing left advising the name and whereabouts of the owner or master, or stating an intent to return. This was an obvious salvage situation, and any mariner would know he should leave some kind of notification. This lack, coupled with the removal of all personal affects for abandonment, more than warranted the court's finding.[2] Abandonment meant loss of any expectation of privacy. Able v. United States, 1960, 362 U.S. 217, 241; United States v. Miller, 1 Cir.,1978, 589 F.2d 1117, 1131,

2/ The reasonablenss of this last inference was confirmed by Taylor's testimony that fear of arrest was why they did not make themselves known. While no one was aware of this at the time, neither can defendants better their case by saying their fear made their abandonment involuntary. United States v. Kendall, 9 Cir. 1981, 655 F. 2d 199, cert. denied, 50 U.S. L.W. 3649; United States v. Colbert, 5 Cir., 1973, 474 F.2d 174,176 (en banc.)

cert denied, 440 U.S. 958. The motion to suppress the various items seized from the yacht was properly denied.

There was also no merit in defendant's critcism of the charge. The court also charged as follows:

"[Y]ou must then determine the purpose of the conspiracy...You may find the defendant in question guilty of conspiracy to possess with the intent to distribute. If you find that the object was not distribution you shall enter a not guilty verdict as to the charge. If you find the defendant not guilty of conspiracy with the intent to distribute then you must determine if a conspiracy existed for the purpose of simple possession rather than distribution."

Defendants objected because the court failed to grant their request that if the jury found they possessed marijuana with "intent to distribute to other members of the conspiracy you must find them not guilty." We are not clear what this confusing statement means. If it had any substance beyond the charge given, it could only have been that there was no intent to distribute if the unknown persons ashore were to be considered personal use co-conspirators. In defendants' case of United

States v. Swiderski, 2 Cir. 1977, 548 F. 2d 445, there was evidence that the two alleged conspirators, husband and wife, had simultaneously and jointly acquired possession of a drug for their own personal use, without intending to distribute the drug further. The Court held that an instruction which allowed a conviction of distribution under such facts was error. Without passing on the soundness of that case, it has no application here, since the complex nature of the operation and the amount of marijuana confiscated belies defendant's contention that they did not intend to transfer the drugs to other persons. United States v. Wright, 9 Cir., 1979, 593 F.2d 105,108. There is no obligation to charge with respect to circumstances not conceivably made out. E.g., United States v. Preiskorn, 8 Cir, 1981, 658 F. 2d 631, 636; United States v. Irwin, 1 Cir. 1979, 593 F. 2d 138, 140-41. The charge given defined defendants' intent to distribute as

distribution "to others" and referred to the lesser included offense of simple possession, and was fully adequate under the facts of this case.

Finally, we deal with the court's failure to suppress certain photographs, positives ordered by the police from four rolls of negatives left by one of the defendants with a Massachusetts processor for development. By happenstance an officer was conversing socially with the owner of the establishment while an employee, engaged in running off samples for test purposes, noticed some unusual depictions and exclaimed, calling the officer's attention thereto. The prints showed tropical scenes, bales, apparently of marijuana, on a yacht, and one for instance of a man sitting on a bale with a shotgun or rifle. The officer ordered an extra set to be made for him. No warrant was sought. Defendants, prior to trial, moved, unsuccessfully, to suppress and for the return of the prints, and

now appeal from their introduction into evidence.

Defendants' argument is a pot pourri. Although at one point they argue they, or at least LaFrance, the delivering defendant, had an expectation of privacy in the films, they concede that "none of their Fourth Amendment rights were implicated by the police observation of the print sheet inadvertantly (sic) exposed to the officer by the employee." This concession is not only correct, it covers the whole case. The court warrantably found this to be a situation where exposure, in the broad sense, by an employee could reasonably be expected. Cf. Smith v. Maryland, 1979, 442 U.S. 735. Once lost by this plain view exposure, the concept of privacy cannot be revived to prevent copying. The police undertook no impermissible seizure by making a copy, leaving the negative and defendants' copies undisturbed. See Coolidge v. New Hampshire, 1971, 403 U.S. 443, 465-466. Affirmed.

APPENDIX B
UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA

v. Crim. No. 80-100024

JOHN EDWARD TAYLOR, KELLY STEPHEN TWOMEY and WAYNE PAUL LAFRANCE

MEMORANDUM OF OPINION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

GIGNOUX, J.

Defendants John Edward Taylor, Kelly Stephen Twomey and Wayne Paul LaFrance are charged in a one-count indictment with conspiring to possess with intent to distribute a large quantity in violation of 21 U.S.C. §§841(a)(1), 846. Presently before the Court are defendants' motions to suppress evidence pursuant to Fed. R. Crim. P. 12(b)(3) and 41. An evidentiary hearing has been held and the issues have been comprehensively briefed and argued by counsel. The following memorandum opinion contains the Court's findings of fact and conclusions of law, as required by Fed. P. Crim. P. 12 (e).

I.

THE FACTS

A. The Vessel "I FORGOT"

At approximately 8:00 a.m. on the morning of September 7, 1979, Bryant Sutherland, a lobster fisherman from Sorrento, Maine, discovered a 51 foot Morgan sailing yacht, the I FORGOT, aground on ledge in the vicinity of Taft Point near Gouldsboro, Maine. The vessel's sails were down and no one appeared to be on board. Sutherland called other fisherman in the area to help. He then left and returned a few hours later, joining another fisherman who had arrived at the scene. The two men boarded the yacht. Sutherland observed green and brown vegetable matter, which he thought was marijuana - "everywhere you looked" on the deck and below in the cabin. He also noted that the vessel appeared to be abandoned; there was no crew and there was no linens on the beds or personal effects on the boat.

At about 11:45 a.m. two other fishing boats arrived. They hooked onto the I FORGOT, floated

it off the ledge, and towed the vessel to Sorrento. En route, Charles Bunker, one of the fishermen involved in the operation, called law enforcement authorities through a local citizens band radio network known as REACT. Bunker relayed the information that the vessel had been recovered and was being taken to Sorrento. While in tow, the I FORGOT rode low in the water, apparently because of the amount of water it had taken in. A small pump was used to remove some of the water. Upon arrival at Sorrento, Bunker secured the vessel to a mooring in the harbor and made arrangements to obtain a larger pump in order to keep the boat from sinking.

Defendants witnesses the salvaging of the I FORGOT. Taylor testified that the three defendants, hiding in the woods, observed for several hours fishing boats come and go, and hover about the stranded vessel. They watched as the fishermen floated it off the rocks and towed it away. After the boats had left, de-

fendants departed. Taylor split from the other two and hitched a ride to Sorrento. When he arrived there, he saw the I FORGOT moored in the harbor. Observing a police car at the dock he did not make any effort to claim the vessel.

Once the yacht had been moored in the harbor, Bunker, also the harbormaster, took his boat to the town dock and picked up Corporal Terry Parsons of the Maine State Police. Cpl. Parsons had answered the call put through earlier by Bunker. As Parsons boarded the vessel, he saw on its deck vegetable matter scraps which he recognized as marijuana debris. Below in the cabin he saw more marijuana debris scattered throughout - on the steps, on the floor, and floating on the water that covered the floor of the cabin. Parsons went back on deck, talked with several other fishermen and then went ashore. After calling police barracks, he drove to Taft Point, where the I FORGOT had been found.

The point on the shore where the boat was discovered lay about one mile from the main road that ran south from the town of West Gouldsboro. Parsons described the shoreline as a large pebble beach. He observed considerable marijuana debris on the shore, and found a flashlight, gas cap, hat and two full cans of starting fluid on the beach.

About 3:00 p.m. Parsons returned to Sorrento harbor and joined Sergeant Harry Bailey and Trooper Michael Vittum of the Maine State Police, who had responded to Parsons' earlier call. Parsons reported to them his findings.

Vittum was ferried out to the I FORGOT by harbormaster Bunker. Bunker indicated concern that the Coast Guard arrive soon, because of his fear that the vessel was still taking on a lot of water. As he was boarding the I FORGOT, Vittum also observed marijuana debris on the deck and a strong marijuana like odor emanating fr the cabin. He went below to look for information pertaining to the vessel's crew. In a desk

in the cabin, he found a navigational chart with certain markings and a tablet of writing paper.

Vittum returned to shore and drove to the area where the vessel had been found. At the end of the dirt road leading to the shore he observed tire impressions of a four wheel drive vehicle. He also saw marijuana debris along the road. In the woods beside the road, about 1000 feet from the shore, he found two car batteries. He also found a storage bag for an inflatable Zodiac raft, paddles, a receipt for the car batteries, and a gas can. Marijuana residue covered the shore. As he had done on the I FORGOT, Vittum collected samples of the debris.

Around midnight the Coast Guard took custody of the vessel in Sorrento and towed it to Southwest Harbor. On the next day, September 8, Drug Enforcement Administration (DEA) Agent Wayne Stedsman, accompanied by Vittum, took additional samples of the marijuana.

It was subsequently discovered that the owner of the I FORGOT was U.S. Northeast Leasing Co. and that on July 20, 1979, Norris Ashe, the president of U.S. Northeast Leasing Co., had leased the vessel for a three-week period to a John Taylor of 821 79th Street, New York, New York. Taylor took possession of the vessel in Curacao on July 24. After giving inconsistent testimony with respect to the lessee's signature on the lease, which is illegible, Taylor finally acknowledged that he signed it. The address on the lease was not Taylor's. Ashe could not identify Taylor as the man who signed the lease.

B. PHOTOGRAPHS

On September 24, 1979, defendant LaFrance went to the Sea Mist Photo Finishing, Inc. in Hyannis, Massachusetts and left four rolls of 110 color film to be developed. He ordered three sets of 3 1/2" x 5" prints. Sea Mist generally told customers they could pick up the film within 24 to 48 hours.

Gerald Schmeer and his brother Victor own and operate Sea Mist, a photo development laboratory located in a small, one-story addition to a residential struction in Hyannis. The laboratory area occupies most of the building. In the front corner of the ground floor is the customer area. A small counter separates the customer area from the processing area. Gerald Schmeer testified that customers frequently went behind the counter and entered the processing area, and that he used the counter regularly to roll out and correct color test prints.

Correcting color prints is a standard process which involves making partial test prints from the developed negatives. A partial print is a photographic print with only the center 2 1/2" developed. All the prints are contained on a roll of photo paper, which Gerald Schmeer customarily takes to the customer counterand unrolls. He examines each partial print individually to insure proper color

and density, and marks any corrections on the print itself.

On September 26, 1979, while Gerald Schmeer was examining the partial test prints of the LaFrance order, Deputy Robert White of the Barnstable County Sheriff's office was talking with Victor Schmeer in the customer area of the shop next to the counter. White routinely visited the shop several times a week either for coffee and conversation with the Schmeers or to deliver or pick up film for the Sheriff's office. His September 26 visit was a social call. Gerald Schmeer unrolled the test print so that about 15 individual prints were visible. Examining the prints, he discovered that one showed a man holding a rifle surrounded by large bales. When he expressed surprise-"Jesus!"-at what the prints showed, White reflexively glanced at the unrolled prints which were upside down from his vantage point. White then moved around the counter to get a better view. Gerald Schmeer continued to unroll the photo paper making visible the remaining test prints.

White, an experienced police officer, recognized that the series of prints "appeared" to depict a marijuana smuggling enterprise "from start to finish." There were photographs of a three man crew sailing a large yacht, the I FORGOT, in apparently tropical waters; and of men sporting a large rifle, holding wads of plant material that looked like marijuana, and sitting on large bales. Several photographs showed large amounts of money.

White asked Gerald Schmeer to hold the film and called his supervisor, Edward Woodin. Woodfin arrived within 30 minutes and examined the test prints. The officers asked Gerald Schmeer to make a fourth set of prints for the police and to take down the license number of LaFrance's car. When LaFrance returned to the shop, he picked up the developed film and the three sets of prints he had ordered. The fourth set of prints were given to the police that same day.

II.

THE LAW

Defendants move to suppress all evidence obtained as a consequence of the seizure and search of the vessel I FORGOT. They also seek to suppress the fourth set of color prints which were obtained by the police from Sea Mist Photo Finishing. They contend that their Fourth Amendment rights were violated because there existed no exigent circumstances to excuse the warrantless seizure and search of the vessel and because a warrant was required in order to obtain the color prints.[1] The Court finds no merit in defendants' contentions.

The Fourth Amendment protects only those who have a "legitimate expectation of privacy" in the premises searched or the property seized.

1/ Defendant LaFrance also had moved to suppress all evidence obtained in a search of his residence in Orleans, Massachusetts on January 14, 1980. The Government has represented it does not intend to use any of the items seized. The parties presented no evidence or argument concerning that seizure. Accordingly, it is not necessary to rule upon that motion.

Rawlings v. Kentucky, 448 U.S. 98, 103-06 (1980); Rakas v. Illinois, 439 U.S. 128, 130-31 n.1 140, 148-49 (1978). The evidence clearly establishes that defendants did not have such a legitimate privacy expectation in either the vessel or the photographs sufficient to support their Fourth Amendment challenges.

A. The Vessel

Defendants have failed to show a sufficient proprietary or possessory interest in the vessel to support their claim of a reasonable expectation of privacy therein.

Defendants established no property interest in the I FORGOT at the time it was seized.[2] They did not own the vessel, which was owned by U.S. Northeast Leasing Co. The only legal interest defendants could claim in the vessel derives from the lease which Taylor signed. Under the terms

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2/ Although property interests are not dispositive of the issue, they are relevant to consideration in determining one's reasonable and legitimate privacy expectation. Rawlings v. Kentucky, supra at 105-06; Rakas v. Illinois, supra at 143-44 n. 12, 149-50 n. 1.

of this lease, however, the vessel was chartered for a three week period. The lease was dated July 20, 1979. Although the effective date of the charter was not specified in the document itself, Taylor testified that he took custody of the vessel on July 24, 1979. Accepting that latter date as the effective date of the charter, the lease had expired and defendants' leasehold interest had terminated long before the discovery of the vessel on September 7, 1979.[3]

3/ Defendants suggest that their right to the use of the vessel continued beyond the expiration date of the lease under the doctrine of demurrage As defined by Black's Law Dictionary, 519 (4th ed. 1957), demurrage is

> [t]he sum which is fixed by the contract of carriage or which is allowed, as renumeration to the owner of a ship for the detention of his vessel beyond the number of days allowed by the charter party ...for sailing.

Even assuming that defendants derived corresponding possessory rights vis-a-vis all but the rightful owner of the vessel under this doctrine such a right would merely bring the Fourth Amendme analysis to the threshold inquiry of whether they nonetheless had a legitimate expectation of privacy therein. A person with a right to possess an item can use it in such a way as to forfeit a legitimate expectation of privacy therein. See United States v. Miller, 589 F.2d 1117, 1131 (1st Cir.) cert. denied. 440 U.S. 958 (19790.

Defendants failed to show a possessory interest in the vessel at the time it was discovered. The evidence discloses that they had abandoned the vessel. Abandonment is primarily a question of intent which may be inferred from "words spoken, acts done, and other objective facts." United States v. Colbert, 474 F. 2d174, 176 (5th Cir. 1973)(en banc). See United States v. Miller, supra, note 3, at 1131. In the instant case, the defendants' actions and the other objective facts conclusively establish abandonment.

The vessel was discovered hard aground on ledge in an unpopulated area along the Maine coast. There was no crew on board and no sign of anyone along the shore. There were no linens on the beds; no personal effects of any kind on the boat; and only a few scraps of food in the cabin. There was no message anywhere on the vessel and on other indication that the crew intended to return. The vessel was littered throughout with marijuana debris,

suggesting that the vessel's cargo had been unloaded and the vessel then left behind on the rocks.[4] Although watching from the shore defendants made no attempt to claim the vessel while the fishermen were salvaging it. The objective facts negate any plausible inference that defendants intended to return to the vessel.

Defendants maintain that even if the objective facts justify a finding of abandonment, such abandonment was "involuntary". This argument is based upon the contention that defendants were forced by circumstances not to claim the vessel in order to avoid arrest. See, Walter v. United States, 447 U.S. 649, 658 n.11 (1980). Taylor testified that although he, Twomey and LaFrance were hiding in the woods close to shore and witnesses the salvaging of the I FORGOT, they did not lay claim to the vessel out of fear that the Coast Guard would soon arrive and they would be inviting arrest. Taylor further testified that he hitchhiked

4/ The Court rejects Taylor's testimony that he deliberately beached the vessel because of a heavy storm the previous night.

to Sorrento to claim the vessel once it had been towed away, but upon arriving at the harbor was deterred from coming forward by the presence of the police. Defendants argue that their subjective intent was not to abandon the vessel and they were prevented from asserting ownership by the iminent threat of arrest.

The Court rejects this argument. The suggestion that defendants were deterred by the prospect of the Coast Guard's arrival while the fishermen were salvaging the vessel or by the existence of police at Sorrento harbor is unpersuasive. "Police pursuit or the existence of a police investigation does not of itself render abandonment involuntary." United States v. Colbert, supra at 176. In the instant case defendants failure to claim the I FORGOT occurred substantially prior to police seizure and search of the vessel. See United States v. Colbert, supra

at 177; United States v. Masiello, 491 F. Supp. 1154, 1160-61 (D.S.C. 1980). Defendants had ample opportunity to assert an interest in the vessel long before the police or the Coast Guard were on the scene - at the time the fishermen first appeared and tended to the vessel. Defendants watched the fishing boats for several hours without making an effort to claim the I FORGOT. By failing to assert control over the vessel, defendants forfeited any legitimate expectation of privacy in the vessel. See United States v. Miller, supra at 1131. It is settled law that one has no standing to challenge a search or seizure of property he has voluntarily abandoned See e.g., Abel v. United States, 362 U.S. 217, 240-41 (1960) .

B. THE PHOTOGRAPHS

Defendants have failed to show a reasonable expectation of privacy in the film LaFrance delivered to Sea Mist Photo for processing.

"[T]he application of the Fourth Amendment

depends on whether the person invoking its protection can claim a 'justifiable', a ' 'reasonable', or a 'legitimate expectation of privacy' that has been invaded by government action." Smith v. Maryland, 442 U.S. 735, 740 (1979); Rakas v. Illinois, supra, at 143-44 n. 12. In order to merit constitutional protection, an individual's subjective expectation of privacy must be "one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan J., concurring). Even if LaFrance had a subjective expectation of privacy in the film given to Sea Mist Photo for development, such an expectation was not reasonable.

LaFrance voluntarily gave a film depicting apparent criminal activity to a commerical establishment for development. In so doing, he necessarily was aware that the employees of Sea Mist Photo would view the prints of

that film. He could have had no reasonable expectation of privacy in information thus voluntarily conveyed and necessarily so exposed to the employees of a commercial establishment. See Smith v. Maryland, supra, at 743-44; United States v. Miller, 425 U.S. 435, 442-43 (1976); Couch v. United States, 409 U.S. 322, 335-36 (1973). Moreover, in giving film depicting apparent criminal activity to a commercial establishment for development, LaFrance "[took] the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." United States v. Miller supra, at 443.[5] One participating in illegal

5/ The Court rejects LaFrance's testimony that Schmeer told him that he would be the only one to see the film. Although Schmeer did not specifically recall his conversation with LaFrance, his unequivocal testimony was that it was not his practice to give assurances of confidentiality to customers and that he had never done so. In any event, the Supreme Court:

> has held repeatedly that the Fourth Amendment does not prohibit the obtaining of

activities cannot reasonably expect that disclosures made to third persons will enjoy constitutional protection simply because of an assumption that the information will not be revealed to the government. Smith v. Maryland, supra; United States v. Miller, supra, United States v. White, 401 U.S. 745, 751-52(1971); Hoffa v. United States, 385 U.S. 293, 302 (1966); Lopez v. United States, U.S. 427 (1963). The police "seized" no more than Schmeer had observed and inadvertently revealed to White.

III.

ORDER

Defendants' motions to suppress evidence are in all respects denied.

IT IS SO ORDERED.

Dated this 10th day of June 1981.

UNITED STATES MAGISTRATE

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5/ information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. United States v. Miller, supra at 443.

APPENDIX C

CONSTITUTIONAL PROVISION

Fourth Amendment, United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX D

21 U.S.C. §841. Prohibited acts A

Unlawful acts

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

21 U.S.C. §844. Penalty for simple possession; conditional discharge and expunging of records for first offense

(a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both, except that if he commits such offense after a prior conviction or convictions under this subsection have become final, he shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(b)(1) If any person who has not previously been convicted of violating subsection (a) of this section, any other provision of this subchapter or subchapter II of this chapter, or any other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, is found guilty of a violation of subsection (a) of this section after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a

condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of his probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the Department of Justice solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under this part for second or subsequent convictions) or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person.

(2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person, if he was not over twenty-one years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained by the Department of Justice under paragraph (1)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to

this section. If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over twenty-one years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty or perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

APPENDIX P

21 U.S.C. §846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.